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In The
Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel.,
Moshe Tal, et al.,

Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, OKLAHOMA,
et al.,

Respondents.

On Petition for Writ of Certiorari to the Oklahoma Supreme Court

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BRIEF OF THE CITY OF OKLAHOMA CITY AND RELATED PARTIES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Oklahoma Supreme Court's application of Oklahoma Rules of issue preclusion and standing in relation to Oklahoma Statutes creating *Qui tam* actions somehow affected the Petitioners' due process rights and whether the Petitioners had a property right that would trigger individual due process requirements.

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The opinion of the Oklahoma Supreme Court is reported at *State of Oklahoma, ex rel. Tal v. The City of Oklahoma City, et al.*, 2000 OK 70, 19 P.3d 268 (Okla. 2000) ("*Tal III*").

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction by seeking a writ of certiorari from the Oklahoma Supreme Court's denial of their Petition for Rehearing. These Respondents, the City of Oklahoma City and Related Parties[1] agree that the ruling below is final for purposes of this Court's jurisdiction under 28 U.S.C. § 1257. However, Petitioners make a number of misstatements in their jurisdictional statement. Specifically, and most importantly, in the Petition for Rehearing which Petitioners filed seeking a reconsideration by the Oklahoma Supreme Court of its Opinion, Petitioners specifically stated that they were not "asking this Court to reconsider its decision affirming the trial court's dismissal of this action." (Petition for Rehearing, p. 2; Appendix, pp. 40-52). Petitioners only asked the Court to modify certain language of its Opinions and the Concurring Opinion. Having failed to raise the constitutional issue which they now attempt to present, Petitioners have waived such claim.

The Oklahoma Supreme Court's routine application of *res judicata* and issue preclusion to a peculiarly state law statutory claim does not raise a due process issue as Petitioners would suggest. There are independent state law grounds for the decision of the trial court below. The trial

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[1]The "Related Parties" are each either current or former elected or appointed officers or employees of the City of Oklahoma City. They are, specifically, Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West and Daniel T. Brummitt.

court made no finding whatsoever as to the basis for its dismissal of the subject action. There were numerous other grounds raised in the Respondent's motion to dismiss the trial court action, including statute of limitations, standing and other issues. (*See*, Respondent's Motion to Dismiss of Defendant The City of Oklahoma City and Related Parties filed below on April 5, 2000, Appendix pp. 1-21; and Reply Brief of Defendants the City of Oklahoma City, Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West and Daniel T. Brummitt in Support of Defendants' Motion to Dismiss, Appendix pp. 22-39).

For these reasons jurisdiction to review the subject action does not exist.

STATUTES INVOLVED

Oklahoma *Qui Tam* Statutes 62 Okla. Stat. §§ 372, 373. (Petitioners'Appendix at pp. 44 to 45.)

Oklahoma intervention statutes 12 Okla. Stat. § 2024(a)(2). (Petitioners' Appendix at pp. 45 to 46.)

STATEMENT OF THE CASE

This case was the third action which Mr. Tal and his associates have brought or caused to be brought in an effort to thwart a private development which was to be part of the MAPs program in Oklahoma City. *Oklahoma City v. Oklahoma City Urban Renewal Authority*, 1999 OK 71, 988 P.2d 901 ("*Tal I*"); *State of Oklahoma ex rel. Moshe Tal v.*

Norick, 1999 OK 85, 991 P.2d 999 ("*Tal II*"). *Tal I* and *Tal II* each made their way to the Oklahoma Supreme Court. MAPs is an acronym which stands for Metropolitan Area Projects. In 1993 the people of the City of Oklahoma City approved a special purpose sales tax to construct public improvements to Oklahoma City and to encourage private development around the new public improvements. Moshe Tal, the principal of the Petitioner group, was an unsuccessful bidder for a private development on real property partially acquired under the MAPs program. A discussion of the history of MAPs and the selection of a developer other than Mr. Tal is contained in the Opinion of the Oklahoma Supreme Court in *Tal I*.[2] There the Court noted that the selection of the private developer for the partial tract of real property and the rejection of the Tal development plan was made "by the City Council only after two years of public meetings, public notices, public hearings, and citizen review." *Id.* at 905.

After his bid was rejected, Mr. Tal began a campaign of appeals and frivolous litigation designed to thwart the winning developer from progressing with its private development.

In *Tal I,* the Oklahoma Supreme Court affirmed and approved the political actions of the City in selecting the

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[2] Mr. Tal was a principal and advanced the Cordish/CCBT development proposal. It lost in a 5-4 decision by the elected members of the Oklahoma City Council. The winner was the TMK/Hogan development proposal. Since the decision of the City Council, Mr. Tal and the TAR members have sought to prevent the development proposed by TMK/Hogan.

winning developer and rejecting the Tal favored proposal. In so ruling, the Oklahoma Supreme Court held that the actions of the City were in all respects lawful. Even though there were disagreements among city council members in the ultimate votes on the various projects, the fact that those disagreements were resolved against Mr. Tal does not in any way support his claim that the various agreements with the winning developer were fraudulent, unlawful or otherwise inadequate. Perhaps the Oklahoma Supreme Court was engaged in wishful thinking when it said "This ends this inquiry." Mr. Tal refuses to accept those dispositions.

In *Tal II*, the Oklahoma Supreme Court affirmed the trial court's order dismissing Mr. Tal's *Qui tam* action because the City had taken action in response to his Demand, which resulted in the development agreements with the winning developer being held valid.

SUMMARY OF MR. TAL'S DEMAND AND THE ALLEGATIONS IN THIS CASE

This *Qui tam* action is premised on a "Written Demand" dated January 12, 1999 (the "Demand") made on the City to recover real property or assets which Mr. Tal alleges were wrongfully transferred. It is the only Demand applicable to this litigation. There are three (3) claims asserted by the plaintiffs in the Demand.

Claim 1 of the Demand is that the December 19, 1997 Parking Redevelopment Agreement and the February 4, 1998 Ground Lease constitute an illegal transfer of approximately 21 acres of real property by the City to the Oklahoma City

Urban Renewal Authority ("OCURA") and ultimately is to benefit the "Hogan's Parking Group".

The Parking Redevelopment Agreement is between OCURA and Bricktown Parking Investors, L.L.C. The Ground Lease is between the same parties. Both agreements were executed more than two years before the commencement of this action, which was filed March 15, 2000. These agreements committed the real property transferred by the City to OCURA located in the MAPs redevelopment area commonly or locally referred to as Bricktown, for use by TMK-Hogan[3].

Claim II of the Demand challenges the validity of the July 21, 1998 Redevelopment Agreement between OCURA and Bricktown TMK/Hogan Entertainment, L.L.C., and concerns itself with approximately 50 acres, which is made up of the same 21 acres identified in Claim I, which was acquired by condemnation by the City and then transferred to OCURA, and some 29 additional acres, which OCURA had acquired on its own and sometime earlier than the MAPs project, financed primarily with federal monies.[4]

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[3] When we are not required to be specific, we sometimes refer to the several TMK/Hogan entities as "TMK-Hogan."

[4] As to the additional 29 acres, the City has not owned that property and MAPS monies were not involved in the acquisition. Arguably, there is nothing that officers of the City can seek to recover for itself and, accordingly, there is nothing as to that land to be claimed in the *Qui tam* action brought by Tal.

Claim II of the Demand alleges that the Redevelopment Agreement is a wrongful transfer of the entire property (approximately 50 acres) by the City and OCURA to TMK/Hogan. This Redevelopment Agreement is within two years of the filing of the lawsuit (March 15, 2000). To the extent, however, that it applies to the 21 acres, it is well beyond two years that the real property was transferred and committed for use by TMK/Hogan, as noted in Claim I of the Demand.

Claim III of the Demand is brought to recover monies spent on a new power plant to provide heating and air conditioning to serve the remodeled and enlarged Myriad Convention Center and the new Sports Arena.

These are the only claims made in the Demand of January 12, 1999 while Petitioners allege that they made "60 plus allegations of wrongdoing" (Petition for Writ of Certiorari, p. 6), these are the only claims raised in the Demand based on the "60 plus allegations." From this Demand, the Plaintiffs' Petition in the trial court attempted to allege six counts or causes of action for relief against the City, the current and past Mayor of the City, officers and key employees of the City, and other private citizens. Each of these counts will be summarized below.

Count I of the Petition sought to invalidate the transfers of real property, the resolution adopted by the City Council authorizing the transfer of real property, and the Parking Redevelopment Agreement, and the Ground Lease described in *Tal I*. Count I also sought to remove a number of existing

public servants from their offices. As it relates to the validity of the City's actions, Count I is barred by the doctrines of issue and claim preclusion and by applicable statute of limitations. To the extent that Count I claim sought the removal from office of officers and officials of the City, the Petitioners, in a *Qui tam* action, lack standing to seek that relief.

Count II sought to recover approximately 50 acres of real property (21 of the 50 acres is that sought to be recovered under Count I) and the cancellation of the July 21, 1998 Redevelopment Agreement.

Count III of the Petitioners' Petition challenged the decision of the City to build a new power plant to furnish heat and air conditioning to the refurbished Myriad and the new Sports Arena. The simplest analysis of this Count is that the Petitioners disagree with the elected members of the City Council's business decision to build a new power plant, instead of extending service from an existing plant. The proper office of a *Qui tam* action is not to second guess the business decisions of elected government representatives. Furthermore, this Count III is barred by applicable statute of limitations.

The Petition further alleged that the entire MAPs Redevelopment Plan is illegal. This claim is barred by issue and claim preclusion, and the applicable statute of limitation. Furthermore, and perhaps more fundamentally, the Petitioners here never filed a demand challenging the validity in the entirety of the MAPs Redevelopment Plan.

Counts IV, V and VI of the Petitioners' Petition was a repackaged version of allegations and arguments rejected by the Oklahoma Supreme Court in *Tal I*. In these Counts, the Petitioners again argued that the Parking Redevelopment Agreement, the Ground Lease and the July 21, 1998 Redevelopment Agreement are illegal. These three agreements and the Redevelopment Plan were specifically approved in *Tal I*, wherein the Oklahoma Supreme Court held:

> The case had been tried and the record developed supports the trial court's findings that the property at issue was sold at its fair market value and that the protections for the public to safeguard its interests spelled out in the Agreements were adequate. **THIS ENDS THE INQUIRY** and T.A.R.'s expression of a contrary opinion in its Demand without actual support, does not change the result. *Tal I*, at 906 (Emphasis added).

ARGUMENT

REASON FOR DENYING THE WRIT

The Petition for Writ of Certiorari argues that the Petitioners had due process rights that were violated by the Oklahoma Supreme Court's application of a long-standing state law rules of issue and claim preclusion and interpretation of the Oklahoma's *Qui tam* statutes. However, as will be demonstrated below, Petitioners did not have any personal or individual property right whatsoever that would trigger a due

process inquiry. Petitioners were not deprived of life, liberty or property within the meaning of the Fourteenth Amendment so as to entitle them to procedural or substantive due process. As has been explained in the context of *Qui tam* actions:

> A *Qui tam* relator has Article III standing only as a relator, on behalf of the government. His standing is in the nature of an assignee of the governments claim . . . thus there is one claim, the government's, pursuable either by the *Qui tam* relator on behalf of the government or by the government on its own behalf.
>
> "In a *Qui tam* case, only the government has a dog in the fight." *United States, ex rel. Barajas, v. Northrop Corporation*, 147 F.3d 905 (9th Cir. 1998), *Id.* at 910.

ARGUMENT

The opinion below involves only the routine application of long-standing Oklahoma state law rules regarding claim and issue preclusion and the interpretation of Oklahoma's *Qui tam* statutes. There are no federal statute interpretations involved in this action nor, notwithstanding the petitions protestations to the contrary, are there serious substantive or procedural federal constitutional claims.

PROPOSITION 1

PETITIONERS HAVE FAILED TO PRESERVE FOR REVIEW THEIR CONTENTION OF DUE PROCESS STANDING.

Petitioners filed a Petition for Rehearing before the Oklahoma Supreme Court after promulgation of the Opinion now sought to be reviewed. (Appendix, pp. 41-52). In that Petition for Rehearing, Petitioners stated:

> The taxpayer is not asking this Court to reconsider its decision affirming the trial court's dismissal of the action.

From the denial of their Petition for Rehearing, the Petitioners now apply to this Court for a Writ of Certiorari. Clearly the Petition for Rehearing did not raise or address the alleged constitutional issues now sought to be brought before this Court. In *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed. 2d 62 (1988), this Court held that where the Federal Constitution issue is not clearly raised in a petition for rehearing filed in the state supreme court, the issue would not be considered. In the *Crenshaw* case, the Court described the references to the constitutional issues in the petition for rehearing as "vague" and "oblique." *Id.* at 77. Here, the Petitioners' Petition for Rehearing does not rise to the level of "vague" or "oblique." It is completely devoid of any reference to a constitutional issue.

Thus having petitioned the Oklahoma Supreme Court for rehearing, but not having raised the constitutional issue now sought to be urged, the Petitioners have waived any such claim of error.

PROPOSITION 2

PETITIONERS' LIFE, LIBERTY OR PROPERTY WAS NOT VIOLATED.

Petitioners attempt to raise a denial of due process claim. However, when this argument is examined in the light of the due process jurisprudence, the error underpinning Petitioners' argument become obvious.

Due process is broken down into two distinct concepts, substantiative and procedural due process. What Petitioners are complaining of is that they were denied procedural due process through the trial court's denial of their motion to intervene in the *Tal I* declaratory judgment action initiated by the City in response to Petitioners' Demand. The Oklahoma Supreme Court affirmed the denial of Petitioners' Motion to Intervene in *Tal I*. Petitioners contend that they were denied procedural due process by the *res judicata* effect given to the Oklahoma Supreme Court's determination in *Tal I* that the City was adequately representing its claims.

A procedural due process requirement requires two distinct inquiries. First, did the Petitioners loose something that fits into the three separate protected categories of life, liberty or property. If so, the Court then moves to the second

part of the inquiry; did the Petitioners receive the minimum measure of procedural protection warranted under the circumstances. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985). There, this Court stated that once it is determined that the due process clause applies, "the question remains, what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481,92 S.Ct. 2593, 260, 33 L.Ed.2d 484 (1972). Property interests are created, and their dimensions are to define by existing rules or understandings that stem from an independent source such as state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972).

In this case, the analysis ends with the first part of the inquiry. Petitioners were not deprived of life, liberty or property. They had no protected property right in the case. Since Petitioners lack any protected right of life, liberty or property, they were not entitled to any form of procedural due process. One who has no property interest at issue may not insist on receiving notice or an opportunity for hearing. *Turley v. Flag-Redfern Oil Company*, 1989 OK 144, 782 P.2d 130. To have a constitutionally protected interest sufficient to be entitled to due process, the party must have more than an abstract need and must have a legitimate claim of entitlement that is defined by an existing rule or understanding that stems from the independent source such as state law. *Roth, supra.*

In this *Qui tam* action, it cannot be overemphasized that the underlying right to be vindicated, if any, ultimately

belongs to the City of Oklahoma City. The Petitioners own nothing. They own no claim and are entitled to make no substantive decisions regarding the business matter of the City of Oklahoma City. The distinction between the rights of the government and the rights of the relator in *Qui tam* actions have been explored in some depth. In the *United States, ex rel. Barajas v. Northrop, supra.*, the Ninth Circuit considered the *res judicata* effect of a settlement and resultant dismissal by the government in a *Qui tam* action under the False Claims Act. In the *Barajas* case, the relator had asserted two claims under the False Claims Act. Two issues were raised relating to the alleged defects in a cruise missile. First was a question of whether or not adequate testing had been performed of a particular part and secondly was whether certain fluids included in the part met specifications. The person who allegedly falsified the reports regarding testing, after being fired, sued Northrop under the *Qui tam* provision of the False Claims Act. The government investigated and elected to take over the action as is allowed by the False Claim Act. The government amended the claim and asserted only the falsified test results and did not claim the liquids failed to meet the required specifications. Northrop was later indicted on criminal violations under the False Claims Act and ultimately pled guilty to the indictment and settled with the government under the *Qui tam* action. The government itself was settling, however, only their claims relating to the falsified test results and not the defective liquids. However, the Ninth Circuit held that the resultant dismissal dismissed all claims relating to the invoices at issue not just the claims relating to the falsified test reports. In holding that the *Qui tam* relator was barred by *res judicata* from asserting claims relating to the

defective liquids, the Court observed that *res judicata* bars relitigation of all grounds of recovery that were asserted or could have been asserted in a previous action between the parties where the previous action was resolved on the merits. The Court observed that both claims, the false certification and the defective fluid claims, arose from the same transaction, specifically the construction and invoicing of a flight data transmitter. The Court held that there is only one claim, the governments, pursuable either by the *Qui tam* relator on behalf of the government or by the government on its own behalf.

Similarly, in *United States v. Schimmels*, 127 F.2d 875 (9th Cir. 1997), the Ninth Circuit applied this Court's statement of *res judicata* in *Montana v. United States*, 440 U.S. 147, 153, 99, S.Ct. 970, 973, 59 L.Ed.2d 210 (1979) to a *Qui tam* action in holding that the doctrine of privity extends the conclusive effect of a judgment to non-parties who are in privity with the parties in the earlier action. The Court then held that the *Qui tam* provisions of the False Claims Act created "sufficiently close" relationship between the United States and the private relators such that the government was bound by the adverse judgment entered against the relators in the proceeding.

Here, the converse is true. The Petitioners are bound by the determinations made in the declaratory judgment action commenced and prosecuted by the City (Tal I), the party that actually "owns" the claim.

This distinction of who owns the claim is what distinguishes this case from *Hansbury v. Lee*, 311 U.S. 32 (1940) and makes petitioners reliance on the *Hansbury* case misplaced. In *Hansbury v. Lee* the party aggrieved and against whom issue preclusion was sought to be applied owned a claim or right that was being infringed upon by the purported application of issue preclusion. The case involves an action to enforce a race exclusion provision in covenants affecting real property. The covenant in question provided for a specified period of time no part of the land covered by the covenant should be "sold, leased or permitted to be occupied by any person of the colored race." The covenant provided that it would not become effective unless it was signed by 95% of the owners of the property within the area. The lawsuit at issue was an action by the respondents seeking to enjoin the petitioners from violating the racial covenant. The petitioners argue that the covenant had never become effective because owners of 95% of the property had not signed it. Respondents attempted to answer this claim by alleging that *res judicata* through a prior decree in an earlier suit to which the respondents were not a party had preclusive effect and barred respondents from relitigating the issue. In the *Hansbury* case, it was clear that none of the petitioners was the successor in interest to or in privy with any parties of the early suit and their predecessors had not signed the underlying covenant. In *Hansbury*, the petitioners in fact owned a property right that was being affected by the issue preclusive effect attempted to be given to the underlying judgment. Specifically, they owned property to which the covenant was attempting to be attached. Their right to own the property or convey it to people "of the colored race" was

purporting to be restricted under the terms of the covenant and the prior decree.

Here, however, the Petitioners own no right and have no claim that is being affected by the preclusive effect given to the underlying judgment. Furthermore, they are in privy to and were participants in the prior litigation. It is the Oklahoma Supreme Court's determination in *Tal I* that is entitled to and was given preclusive effect in *Tal III*. *Tal I* is the underlying appeal from Petitioners denial of Petitioners' intervention in that case where the Oklahoma Supreme Court found that the claims were being adequately represented by the City.

Petitioners' misplaced reliance on *Hansbury v. Lee* is further demonstrated by the case of *Smith v. Alleghany Corporation*, 394 F.2d 381 (2nd Cir. 1968). In the *Smith v. Alleghany Corporation* case, the situation presented was a stockholders derivative action. The Court observed it is very different from the type of claim asserted in *Hansbury*. Similar to a *Qui tam* action, in a stockholders derivative suit there is but one claim, not separate claims as was presented in *Hansbury*.

The *Qui tam* statutes of Oklahoma are purely a creature of Oklahoma law. There is no independent right to bring such an action absent the creation of the Oklahoma statutes. This Court examined the history of *Qui tam* actions in its opinion in *Vermont Agency of Natural Resources v. United States, ex rel. Stephens*, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). There the Court observes that *Qui tam*

actions had their origin around the end of the Thirteenth Century. *Qui tam* actions generally fell into disuse in the Fourteenth Century although appearing to remain technically available. Parliament then began enacting statutes that explicitly provided for *Qui tam* suits. *Id.* at 774. The Court further observed, however, although *Qui tam* actions, were prevalent for a period immediately before and after the framing of the Constitution, "[t]here is no evidence that the Colonies allowed common law *Qui tam* actions. . ." *Id.* at 776.

Therefore, the right the Petitioners sought to assert in this action is purely a creation of the Oklahoma *Qui tam* statutes and must be defined and interpreted within the boundaries of those statutes. Under Oklahoma's *Qui tam* statutes, the relator of the *Qui tam* action only has a role if the City does not respond to the written demand. Here, the City did respond to the Demand by bringing a declaratory judgment action to test the validity of the underlying development agreements. Like the *Barajas* case, however, the City does not have to adopt all of the claims of the relators. There was essentially, however, only one claim that the Redevelopment Agreements were illegal and the real property consisting of approximately 50 acres should be recovered for the City. The trial court in *Tal I* made the determination that those development agreements were legal and valid, under Oklahoma law, and that the principal relator and the unsuccessful attempted developer, had no standing to intervene in the declaratory judgment action brought by the City. That determination was made by the trial court after the trial court reviewed in detail the deposition of relator's

principal protagonist, Mr. Tal. Petitioners attempt to make an issue of the fact that his deposition, and others, were not taken by the City, but were conducted by co-defendants. There was no need for the City's counsel to re-plow ground or duplicate the taking of a deposition, attended by the City, and adequately covered by the co-defendants' counsel.

In as much as there was only one claim to be vindicated in the *Qui tam* action, specifically a claim owned by the City of Oklahoma City, the determination made not once but at least three times by the Oklahoma Supreme Court that those contracts and agreements are lawful ends the inquiry.

PROPOSITION 3

IT IS NOT THE PROPER FUNCTION OF THIS COURT IN A QUI TAM ACTION TO SUPERCEDE ITS JUDGMENT FOR THAT OF THE CITY OF OKLAHOMA CITY'S ELECTED REPRESENTATIVES

Petitioners' principal complaint is that he is unhappy with the results of the selection process. He asks this Court to substitute its own judgment for that of the City Council and make the business decision that Mr. Tal and the Cordish/CCBT group should have been chosen as the developer for the 50 acres of land.

In *Tal I*, the Oklahoma Supreme Court observed that it was not for the Court to decide whether a more attractive deal was available for the City. "Such issues were for City

Council and the City Council resolved them." *Tal I*, at 906. The Court concluded by holding that there was no evidence that the declaratory judgment action that the City had commenced was collusive or fictitious and therefore it fully and completely approved each of the actions complained of in that proceeding. *Id.* at 907-908.

The Oklahoma Supreme Court has repeatedly enforced the separation of powers concept and recognized that the function of a *Qui tam* action was not to reevaluate the business decisions made by City officials. In *State ex rel. Brown v. City of Warr Acres*, 1997 OK 117, 946 P.2d 1140, the Court addressed complaints regarding the City of Warr Acres' decision to support the building of a Wal-Mart Super Center in its community. The Court there observed that economic development was recognized as a legitimate public purpose, and the City Council is the legislative body of a city. As such, it is the City Council's function to determine what expenditures are designed to promote the public good and welfare of the city and its inhabitants. It has no limitations as to expenditures, "save and except those which are expressly placed on its exercise by the Constitution of the State." *Id.* at ¶ 17, 1144. In this case, the City Council's authority to determine what is best for the City of Oklahoma City should not be ignored by this Court.

It is not for this Court, or any other court for that matter, to revisit the wisdom of the Oklahoma City Council's business decisions as to what is best for the City. It is the basic function of representative government that decisions in this country are made by our elected officials. As Justice

Douglas stated for the Court the Opinion in *Olsen v. Nebraska*, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305 (1941) "we are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which should be left where . . . it was left by the Constitution -- to the State and to Congress." *Id.* at 246.

For the judiciary to be receptive to reevaluating the business judgment of elected government officials by entertaining complaints by citizenry that various actions were either unwise or unnecessary, thwarts the basic concept of the Republic and should not be entertained by this Court.

PROPOSITION 4

PETITIONERS WERE GIVEN AN ADEQUATE OPPORTUNITY TO BE HEARD WHEN THEY SOUGHT TO INTERVENE IN *TAL I*

Petitioners were afforded an opportunity to be heard. Their written demand and their individual depositions were made a part of the record considered by the trial court in *Tal I*. As the Oklahoma Supreme Court opinion in *Tal I* demonstrates, the trial court gave Petitioners their opportunity to be heard on that motion. As the Oklahoma Supreme Court observed:

> On February 22 and 23, 1999, Defendants took the deposition of Appellants . . . . Appellants' attorney appeared at each of the depositions. Tal's

deposition was 129 pages long. After the trial had commenced, Appellants' attorney filed a motion to intervene and for continuance. The trial court, after argument of counsel, considering the depositions of Tal and the other T.A.R. members who had been deposed, and also considering T.A.R.'s Written Demand, denied T.A.R.'s motion to intervene.

* * *

Tal's claims that the failure of the trial court to allow him to intervene and hear his testimony was prejudicial to his rights and those of T.A.R. We note, however, that the trial court considered Tal's 129 page deposition and Tal does not suggest that there are any facts in support of his claim of unlawfulness beyond those contained in the allegations of T.A.R.'s Demand. The trial court read and considered T.A.R.'s Written Demand and the depositions of all of its members. It is obvious that the trial court concluded that the factual allegations in T.A.R.'s Demand and the deposition testimony of its members were insufficient to support T.A.R.'s claim for intervention. For the reasons previously discussed, we agree. *Tal I*, at 906.

* * *

> The trial court heard T.A.R.'s arguments and read the depositions of its members before ruling on T.A.R.'s motion to intervene. *Tal I*, at 907.
>
> * * *
>
> T.A.R. was not entitled to intervene in Oklahoma City's declaratory judgment action because Oklahoma City was representing the rights of all of its taxpayers and was entitled to the presumption that it would do in good faith. T.A.R. failed to overcome this presumption. Further T.A.R. made no claim and the record would not support that Oklahoma City's suit was conclusive or frivolous. Thus, the trial court did not error in denying both T.A.R.'s motion to intervene and its motion for continuance. *Tal I*, at 908.

It is clear from the foregoing that the Oklahoma Supreme Court observed not just once or twice, but at least four times in its Opinion in *Tal I* that the trial court had carefully considered TAR's motion to intervene, the Written Demand of January 12, 1999, filed with the City, and his deposition and the deposition testimony of the TAR members

The Petitioners, in their brief, try to give justifications for reasons that their proposed petition in intervention in *Tal I* was limited in scope. Such strategic decisions by the Petitioners' counsel, does not constitute a deprivation of procedural due process. The fact that they chose not to tell

what they now contend is their whole story, does not mean that they were not given the opportunity to do so. All the due process requires is the opportunity to be heard. The Petitioners cannot now be heard to turn their decision to hide behind the log into a denial of due process and an opportunity to be heard. Clearly, Petitioners had their opportunity, they argued their motion to intervene, the trial court clearly considered their deposition testimony and their Written Demand, the fact that they chose not to present all of that which they now contend is the whole story is immaterial to the due process inquiry.

PROPOSITION 5

INDEPENDENT STATE LAW GROUNDS SUPPORT THE DECISIONS BELOW

The Motion to Dismiss filed by the Respondents and the Reply Brief in further support of the Motion (contained in the Appendix pages 1-21 and 22-39, respectively) alleged other grounds for dismissal of the action other than the issue preclusive effect of the prior Oklahoma Supreme Court Opinions. Specifically, Respondents argued that the district court lacked jurisdiction to oust government officials as was sought by the written demand and the Petition, that the Petition was barred by the Oklahoma State Law Statute of Limitations and that the goal of the Petition, specifically to revisit the business decision of the City of Oklahoma City, was not a proper function of the Court in a *Qui tam* action. These purely state law grounds for the underlying decision are sufficient to support the underlying decision. Therefore, this

Court should decline to review the underlying opinions of the Oklahoma Supreme Court which rest purely on state law grounds. *Klinger v. Missouri*, 13 Wall. 257 (1871); *Fox Film Coop v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed.158. (1935); *Murdock v. Memphis*, 20 Wall. 590 (1875); *Berea College v. Kentucky*, 211 U.S. 45 (1908); *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

CONCLUSION

For the foregoing reasons Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Appendix 1

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, et al., Plaintiffs,	)
v.	)Case No. CJ-2000-2052
THE CITY OF OKLAHOMA CITY, et al., Defendants.	)

MOTION TO DISMISS OF THE DEFENDANTS THE CITY OF OKLAHOMA CITY, RONALD J. NORICK, KIRK D. HUMPHREYS, JAMES E. THOMPSON, WILLIAM O. WEST AND DANIEL T. BRUMMITT AND BRIEF IN SUPPORT THEREOF

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April 5, 2000

Appendix 2

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Appendix 3

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. CJ-2000-2052
THE CITY OF OKLAHOMA CITY, et al.,	)	
Defendants.	)	

MOTION TO DISMISS OF THE DEFENDANTS THE CITY OF OKLAHOMA CITY, RONALD J. NORICK, KIRK D. HUMPHREYS, JAMES E. THOMPSON, WILLIAM O. WEST AND DANIEL T. BRUMMITT AND BRIEF IN SUPPORT THEREOF

The defendants, The City of Oklahoma City ("City"), and the individuals Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West and Daniel T. Brummitt, for reasons more fully set out below and pursuant to 12 O.S. § 2012 hereby move this Court to dismiss the subject action. In support of their motion, the defendants would show the Court as follows:

INTRODUCTION

This is the third action which Mr. Tal and his associates have brought or caused to be brought in an effort to thwart the development of the MAPS program in Oklahoma

City. *Oklahoma City v. Oklahoma City Urban Renewal Authority*, 1999 OK 71, 988 P.2d 901 ("*Tal I*"); *State of Oklahoma ex rel. Moshe Tal v. Norick*, 1999 OK 85, 991 P.2d 999 ("*Tal II*"). *Tal I* and *Tal II* have made their way to the Oklahoma Supreme Court. In *Tal I*, the Oklahoma Supreme Court affirmed and approved the actions of the City. In so ruling, the Oklahoma Supreme Court held that the actions of the City were in all respects lawful. Even though there were disagreements among city council members in the ultimate votes on the various projects, the fact that those disagreements were resolved in a way that Mr. Tal does not like does not in any way support his claim that the various agreements were fraudulent, unlawful or otherwise inadequate. Perhaps the Oklahoma Supreme Court was wishful thinking when it said "This ends this inquiry." Obviously, Mr. Tal refuses to accept those dispositions.

In *Tal II*, the Oklahoma Supreme Court affirmed this Court's order dismissing Mr. Tal's *Qui tam* action as premature because the City had taken action in response to his Demand.

In this action ("*Tal III*"), Mr. Tal not only seeks to revisit the issues decided by the Oklahoma Supreme Court in the *Tal I* and *Tal II*, but he also seeks to oust the above individual defendants from their government offices. For the reasons more fully set out below, these defendants will show the Court that the legality and legitimacy of the City's actions have in all respects been approved in *Tal I* and *Tal II*, that plaintiffs' claims are barred by applicable statute of limitations, and that the plaintiffs, under clear Oklahoma Supreme Court authority, lack the standing to seek the removal from office of the above individual defendants.

Appendix 5

SUMMARY OF MR. TAL'S DEMAND AND THE ALLEGATIONS IN THIS CASE

This *Qui tam* action is keyed on a Demand made on the City to recover property or assets which Mr. Tal alleges were wrongfully transferred to another. The Demand was filed with the City on January 12, 1999. It is the only Demand applicable to this litigation. A copy of the Demand is attached to the Petition filed herein by the Plaintiffs. There are three (3) claims asserted by the plaintiffs in the Demand.

Claim 1 of the Demand is that the December 19, 1997 Parking Redevelopment Agreement and the February 4, 1998 Ground Lease constitute an illegal transfer of approximately 21 acres of real property by the City to the Oklahoma City Urban Renewal Authority ("OCURA") and ultimately is to benefit the "Hogan's Parking Group". (*See* Demand at p. 2.)

The Parking Redevelopment Agreement is between OCURA and Bricktown Parking Investors, L.L.C. (*See* Demand at p. 2.) The Ground Lease is between the same parties. (*See* Demand at p. 2.) Both agreements were executed more than two years before the commencement of this action, which was filed March 15, 2000. These agreements committed the real property transferred by the City to OCURA located in the redevelopment area of Bricktown, for use by TMK-Hogan[1]. All this occurred more than two years before this litigation was begun.

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[1] When we are not required to be specific, we sometimes refer to the several TMK/Hogan entities as "TMK-Hogan."

Claim II of the Demand challenges the validity of the July 21, 1998 Redevelopment Agreement between OCURA and Bricktown TMK/Hogan Entertainment, L.L.C., and concerns itself with approximately 50 acres, which is made up of the same 21 acres identified in Claim I, which was acquired by condemnation by the City and then transferred to OCURA, and some 29 additional acres, which OCURA had acquired on its own, financed primarily with federal monies.[2] (*See* Demand, at p. 7.)

Claim II of the Demand alleges that the Redevelopment Agreement is a wrongful transfer of the entire property (about 50 acres) by the City and OCURA to TMK/Hogan. This Redevelopment Agreement is within two years of the filing of the lawsuit (March 15, 2000). To the extent, however, that it applies to the 21 acres, it is well beyond two years that the real property was transferred and committed for use by TMK/Hogan, as noted in Claim I of the Demand.

Claim III of the Demand is brought to recover monies spent on a new power plant to provide heating and air conditioning to serve the remodeled and enlarged Myriad Convention Center and the new Sports Arena. (*See* Demand, at pp. 12-15.)

These are the only claims made in the Demand of January 12, 1999. From this Demand, the Plaintiffs' Petition

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[2] As to the additional 29 acres, the City has not owned that property and MAPS monies were not involved in the acquisition. Thus, there is nothing that officers of the City can seek to recover for itself and, accordingly, there is nothing to be claimed by the *Qui tam*.

attempts to allege six counts or causes of action for relief against the City, the current and past Mayor of the City, officers and key employees of the City, and other private citizens. Each of these counts will be summarized below.

Count I of the Petition seeks to invalidate the transfers of real property, the resolution adopted by the City, the Parking Redevelopment Agreement, the Ground Lease and the July 21, 1998 Redevelopment Agreement described in *Tal I*. Count I also seeks to remove a number of public servants from their existing offices. As will be shown below, this Count I, as it relates to the validity of the City's actions, is barred by the doctrines of issue and claim preclusion and by applicable statute of limitations. To the extent that Count I claim seeks the removal from office of all the various officers and officials of the City, it will be shown conclusively, that the Plaintiffs lack standing to seek that relief.

Count II of the Plaintiffs' Petition challenges the decision of the City to build a new power plant to furnish heat and air conditioning to the refurbished Myriad and the new Sports Arena. The simplest analysis of this Count is that the Plaintiffs disagree with the City's business decision to build a new power plant, instead of extending service from an existing plant operated by Trigen. The proper office of a *Qui tam* action is not to second guess the business decisions of elected government representatives. Furthermore, this Count II is barred by applicable statute of limitations.

Count III alleges that the entire MAPS Redevelopment Plan is illegal. This claim is barred by issue and claim preclusion, and the applicable statute of limitation. Furthermore, and perhaps more fundamentally, the plaintiffs

here never filed a demand challenging the validity of the MAPS Redevelopment Plan.

Counts IV, V and VI of the Plaintiffs' Petition is a repackaged version of allegations and arguments rejected by the Oklahoma Supreme Court in *Tal I*. In these Counts, the plaintiffs again argue that the Parking Redevelopment Agreement, the Ground Lease and the July 21, 1998 Redevelopment Agreement are illegal. These three agreements and the Redevelopment Plan were specifically approved by Judge Gray of this Court, and that ruling was affirmed in *Tal I*:

> The case had been tried and the record developed supports the trial court's findings that the property at issue was sold at its fair market value and that the protections for the public to safeguard its interests spelled out in the Agreements were adequate. **THIS ENDS THE INQUIRY** and T.A.R.'s expression of a contrary opinion in its Demand without actual support, does not change the result. *Tal I*, at 906 (Emphasis added).

PROPOSITION 1

THE DISTRICT COURT HAS NO JURISDICTION OVER ACTIONS BY CITIZENS FOR OUSTER OF GOVERNMENT OFFICIALS

Perhaps the most glaring of the defects in Plaintiffs' Petition is their effort to seek the judicial removal from office of various government officials basically for the reason that Mr. Tal disagrees with the actions taken by those individual

defendants. Plaintiffs cloak those allegations with hyperbole, but in any event those allegations need not be disposed of nor decided by this Court. Mr. Tal's allegations range from nefarious actions by some to simple non-performance of a particular individual's responsibilities. Nonetheless, plaintiff's Count I, seeking the removal from office of the individual defendants must be dismissed.

Since 1927, the Oklahoma Supreme Court has held that the individual citizens lack the standing and, in actions brought by individual citizens, that district courts lack jurisdiction over any action seeking removal of elected and other officials.

11 Okla.Stat. § 8-107 provides that municipal officers may be removed from office for cause specified by applicable state law for the removal of state officers and by the methods therein prescribed. In *Alberty v. Parks*, 1927 OK 472, 261 P. 940, the Oklahoma Supreme Court issued a writ of prohibition against a district judge of Adair County who purported to exercise jurisdiction for the removal of school board members from their respective elective offices. The Supreme Court held that the district court was without jurisdiction to make any order in the case. The main action, as the Supreme Court observed, was an action by private individuals, as tax payers, to remove the defendants from public office. The Oklahoma Supreme Court held that "it is clear that the court is without jurisdiction to entertain this action." *Id.* at 940. The Supreme Court observed that the procedure for removal of elected officers is set out by statute and that "[t]he statute does not authorize the removal of members of a school board from office on petition filed by private citizens. The court, being without jurisdiction to hear

and try the main action, was without jurisdiction to issue an interlocutory order therein." *Id.* at 941.

The Oklahoma Supreme Court again addressed the same issue in *L-Acquarius v. Hampton*, 1982 OK 34, 642 P.2d 1143. Inmates had filed *pro se* petitions seeking the ouster of various officials and employees of the Department of Corrections. The petition asked the Oklahoma Supreme Court to assume original jurisdiction and issue a writ of mandamus requiring the respondent district judge to disqualify himself, and require both the Attorney General and the District Attorney to prosecute the inmates' *pro se* action for removal of the government officials and employees. The Oklahoma Supreme Court observed, as the Court had in the *Alberty* case, that proceedings to remove public officials and officers may be had only in the manner prescribed by statute. In holding that the district court lacked jurisdiction to entertain the action brought by private citizens, the Oklahoma Supreme Court stated:

> The district court is without jurisdiction to entertain an ouster action on petition filed in the district court by private citizens.
> *Id.* at 1144.

The Oklahoma Supreme Court reached that decision in a short four-paragraph *per curiam* opinion which cited the *Alberty* case as controlling authority.

Additionally, plaintiffs lack standing to seek treble monetary damages against current and past City officers. Plaintiffs' Demand makes no request for such relief. Therefore, plaintiffs cannot now seek monetary relief against the individual defendants.

It is therefore abundantly clear that this Court lacks jurisdiction to entertain plaintiff's claim for money damages or an ouster action against the public officers, officials and employees. The statutory scheme for such actions is exclusive. This was clearly held in the *L-Acquarius* and *Alberty* cases. The plaintiff's Count I and the allegations to the contrary are patently frivolous and brought in violation of 12 Okla.Stat. § 2011.

PROPOSITION 2

ON THE FACE OF THE PETITION THE CLAIMS ARE BARRED BY STATUTE OF LIMITATIONS

Plaintiffs attempt to allege that the 3 claims and the various issues which they attempted to raise in their Demand were not adjudicated in either *Tal I* or *Tal II*. While the moving defendants disagree with that conclusion, this Court is not required to plow that ground. If there were any claims or issues on which the City did not take action, the *Qui tam* action which plaintiff seeks to bring here is barred by the statute of limitations. Section 374 of Title 62 provides the limitations period for *Qui tam* actions. It states that these suits must be filed:

> [w]ithin six (6) months following the refusal, failure, or neglect of the proper officers to act upon the written demand.
> 62 Okla. Stat. §374 (1994).

Mr. Tal's Demand was filed on January 12, 1999. (See Petition, at p. 2, ¶2.) This action was not commenced

until March 15, 2000, which is more than six months after the Demand was filed.

Mr. Tal admits that the City responded to his Demand and brought an action for declaratory judgment in January of 1999, "less than two (2) days after the Taxpayers' Written Demand was filed." (See Petition, at p. 2, ¶2.) He claims, however, that this declaratory action did not address all of the claims he alleged in his Demand. (See Petition, at p. 3, ¶4.)

Mr. Tal's claims, to the extent that they are based upon issues allegedly omitted from the City's declaratory judgment suit, are not timely. He did not file this action within six months after the City's "refusal, failure or neglect" to act on those issues. His Demand was filed on January 12, 1999 and the City's suit was filed in January, 1999. He did not sue on the allegedly omitted issues until March, 2000. He is beyond the six month limitations period and his claims are barred.

PROPOSITION 3

IT IS NOT THE PROPER FUNCTION OF THE COURT IN A *QUI TAM* ACTION TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE CITY'S ELECTED REPRESENTATIVES

Mr. Tal's principle complaint regarding the power plant is that the plant was, in his view, unnecessary. He asks this Court to substitute its own judgment for that of the City Council and make the business decision of whether the new power plant was necessary.

In *Tal I*, the Oklahoma Supreme Court observed that it was not for the Court to decide whether a more attractive deal was available for the City. "Such issues were for City Council and the City Council resolved them." *Tal I*, at 906. The Court concluded by holding that there was no evidence that the declaratory judgment action that the City had commenced was collusive or fictitious and therefore it fully and completely approved each of the actions complained of in that proceeding. *Id.* at 907-908.

The Oklahoma Supreme Court has repeatedly enforced the separation of powers concept and recognized that the function of a *Qui tam* action was not to reevaluate the business decisions made by City officials. In *State ex rel. Brown v. City of Warr Acres*, 1997 OK 117, 947 P.2d 1140, the Court addressed complaints regarding the City of Warr Acres' decision to support the building of a Wal-Mart Super Center in its community. The Court there observed that economic development was recognized as a legitimate public purpose, and the City Council is the legislative body of a city. As such, it is the City Council's function to determine what expenditures are designed to promote the public good and welfare of the city and its inhabitants. It has no limitations as to expenditures, "save and except those which are expressly placed on its exercised by the Constitution of the State." *Id.* at ¶ 17, 1144. In this case, the City Council's authority to determine what is best for the City should not be ignored by this Court.

It is not for this Court, or any other court for that matter, to revisit the wisdom of the Oklahoma City Council's business decisions as to what is best for the City. It is the basic function of representative government that decisions in this country are made by our elected officials. The Oklahoma

Supreme Court has long recognized the autonomy of city governments. In *Utility Supply Company, Inc. v. City of Broken Arrow*, 1975 OK 106, 539 P.2d 740, the Court stated as follows:

> It is not the function of courts to substitute their judgment for that of duly-constituted municipal legislative authorities.
>
> * * *
>
> The powers of a city and how it should conduct its affairs are legislative functions. The only justiciable question is whether the authority granted or the exercise of it may be denominated as arbitrary and unreasonable.
>
> The police power of a municipality is comprehensive and is exercised to promote the health, comfort, safety or welfare of society. In the enactment of ordinances and regulations much must be left to the discretion of municipal authorities. Their acts will not meet with judicial interference unless they are manifestly unreasonable and oppressive, unwarrantedly invade private rights, clearly transcend the police powers given to them, or infringe upon the rights secured by fundamental law.
>
> * * *
>
> The court may not test in the balances of judicial review the weight and sufficiency of

> the facts which sustain the conclusion of the legislative body . . .
> *Id.* at 743 (citations omitted).

See also Glaser v. Tulsa Metropolitan Area Planning Commission, 1961 OK 47, 360 p.2d 247.

For the judiciary to be receptive to reevaluating the business judgment of elected government officials by entertaining complaints, by citizenry that various actions were either unwise or unnecessary, thwarts the basic concept of the republic and should not be entertained by this Court.

PROPOSITION 4

THE OKLAHOMA SUPREME COURT HAS FULLY AND COMPLETELY ADJUDICATED THE ISSUES RELATING TO THE LAWFULNESS OF THE MAPS REDEVELOPMENT PLAN AND THE ENTERTAINMENT COMPLEX

In *Tal I*, the Oklahoma Supreme Court addressed Mr. Tal's appeal from Judge Gray's denial of his motion to intervene and motion for continuance in a declaratory judgment action which the City had commenced in response to Mr. Tal's Demand. After an extensive analysis of the history of MAPS and the description of the transactions of which Mr. Tal complained, the Oklahoma Supreme Court held that the City's suit fully and completely determined the issues raised by Mr. Tal. Although Mr. Tal and his associates claim that the City's suit was not responsive to Mr. Tal's demand because the City did not support Mr. Tal's position, the Court held that the City was not required to do

so. In approving the City's actions, the Oklahoma Supreme Court stated as follows:

> The case has been tried and the record developed supports the trial court's findings that the property at issue was sold at its fair market value and that the protections for the public to safeguard its interests spelled out in the Agreements were adequate. **THIS ENDS THE INQUIRY** and T.A.R.'s expression of a contrary opinion in its Demand without actual support, does not change the result. (Emphasis added) *Id.* at ¶ 19.

The Court also observed that there was nothing in the record to reflect that the City had acted in bad faith. The Court stated that "[the City's] actions were taken under the glare of public scrutiny and were resisted by a significant minority of the City Council." The Court then observed that the fact that "the disagreements among Council members were resolved in a way that Tal and other T.A.R. members do not like does not support in any way T.A.R.'s claim that the development agreements were either fraudulent, unlawful, or otherwise inadequate." *Id.* at 906.

Now, in *Tal III*, Mr. Tal and the other plaintiffs ask this Court to revisit each of those determinations. Oklahoma law has long prohibited the re-litigation of issues previously determined by a court. The label Oklahoma courts place on the theory that prevents re-litigation of issues previously decided, has varied over time. In *Miller v. Miller*, 1998 OK 24, 956 P.2d 887, Justice Opala, writing for the Court, explained the difference between the doctrines of claim

preclusion and issue preclusion. Justice Opala stated as follows:

> Under the principle of claim preclusion, a final judgment on the merits of an action precludes the parties from re-litigating not only the adjudicated claim, but also any theories or issues that were actually decided or could have been decided in the action.

In defining issue preclusion, Justice Opala stated as follows:

> The other preclusion doctrine, which sometimes precisely goes under the name of *res judicata*, is issue preclusion. Under the doctrine of issue preclusion, once a court has decided and issue of fact or of law necessary to its judgment, the same parties or other parties may not litigate that issue in a suit brought under a different claim.

In conclusion Justice Opala observed as follow:

> The purpose of issue preclusion is to "relieve the parties of the cost and vexation of multiple law suits, conserve judicial resources and by preventing inconsistent decisions, encourage reliance on adjudication.

Clearly these laudable goals of issues and claim preclusion are lost on Mr. Tal. This is the third law suit arising from Mr. Tal's disappointment in not being selected as a developer of the Bricktown entertainment complex. His response to those decisions is not to be a supporter of the

development of Oklahoma City, but to do everything he can to thwart that development in the hope that further delay of the development will benefit him. It is clear from the reading of *Tal I* and *Tal II*, that the Oklahoma Supreme Court and the trial courts below have fully adjudicated the issues relating to the development of MAPS projects and determined that Mr. Tal's complaints are not supported by any evidence.

Mr. Tal also asks this Court to ignore the permanent injunction affirmed in *Tal I*. This injunction ordered the City and OCURA to perform the Development Agreements challenged in Mr. Tal's Demand. *Tal I*, 988 P.2d at 904.

A *Qui tam* action can not require the City to act in a manner that would cause it to violate a valid permanent injunction entered by the District Court of Oklahoma County, and upheld by the Oklahoma Supreme Court.

For the forgoing reasons, *Tal I* precludes re-litigation of those issues here and the petition should therefore be dismissed.

SUMMARY

Count I seeks to invalidate the Parking Redevelopment Agreement, the Ground Lease, and the July 21, 1998 Redevelopment Agreement. It also seeks the removal from their office of the individual defendants who hold public office. Count I should be dismissed. It is barred by issue and claim preclusion, the applicable statute of limitations and those plaintiffs lack the standing as a matter of law to commence a removal action against the individual defendants named in this suit and to seek money damages from them when none were addressed in their Demand.

Count II seeks to revoke the decision of the City Council to build a new power plant to service the remodeled and expanded Myriad and the new sports arena and to cause the City instead to negotiate a new agreement for heat and air conditioning with Trigen. Count II should be dismissed. It is not a proper use of a *Qui tam* action to seek to substitute the business judgment advanced by Mr. Tal for that of the City Council. Furthermore, this Count II is also barred by the application statute of limitations.

Count III attacks the validity of the June 24, 1997 Redevelopment Plan, which is also described as the MAPS Sports-Entertainment-Parking-Support Redevelopment Plan. The plaintiffs' Demand of January 12, 1999, does not describe this to be an illegal document and in fact the plaintiffs in all their earlier filings have not attacked this agreement. It cannot not be the object of a *Qui tam* action. Further, its validity has been previously determined in *Tal I* and that decision is binding on these plaintiffs. Count III must be dismissed.

Count IV on differing grounds, attacks the validity of the July 21, 1998 Redevelopment Agreement. For the same reasons set forth above in Count I, this Count IV should be dismissed.

Count V on differing grounds, attacks the validity of the Parking Redevelopment Agreement approved by the City Council on December 19, 1997. For the same reasons set forth above in Count I, this Count V should be dismissed.

Count VI attacks the transfer of approximately 21 acres of land for use in implementing the Parking Redevelopment Agreement, the Ground Lease, and the July

21, 1998 Redevelopment Agreement. For the reasons set forth in Count I, this Count VI should also be dismissed.

CONCLUSION

Plaintiffs' continued efforts to thwart the redevelopment in Bricktown that MAPS has provided for Oklahoma City should fall on deaf ears. Mr. Tal's issues have been litigated and fully decided. The plaintiffs seek again to second guess and substitute their judgment for the business decisions made by the elected government officials of Oklahoma City. It is not the function of the judiciary to reevaluate business decisions made by legislative branches of government. The Constitution and the statutes of Oklahoma encompass the concept of separation of powers. The judiciary should not second guess what the elected city officials have decided was best for the city.

For the foregoing reasons, these defendants pray this Court to dismiss the action with prejudice to future filing and

without leave to amend the pleadings, for such amendment will not cure the defects pointed out herein.

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[Certificate of Service Omitted in Printing]

Appendix 22

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, et al., Plaintiffs,	)	
v.	)	Case No. CJ-2000-2052
THE CITY OF OKLAHOMA CITY, et al., Defendants.	)	

REPLY BRIEF OF DEFENDANTS THE CITY OF OKLAHOMA CITY, RONALD J. NORICK, KIRK D. HUMPHREYS, JAMES E. THOMPSON, WILLIAM O. WEST AND DANIEL T. BRUMMITT IN SUPPORT OF DEFENDANTS'S MOTION TO DISMISS

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April 24, 2000

Appendix 23

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Appendix 24

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, et al.,	)
Plaintiffs,	)
v.	)Case No. CJ-2000-2052
THE CITY OF OKLAHOMA CITY, et al.,	)
Defendants.	)

REPLY BRIEF OF DEFENDANTS THE CITY OF OKLAHOMA CITY, RONALD J. NORICK, KIRK D. HUMPHREYS, JAMES E. THOMPSON, WILLIAM O. WEST AND DANIEL T. BRUMMITT IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The defendants, The City of Oklahoma City ("City"), and the individuals Ronald J. Norick, Kirk D. Humphreys, James E. Thompson, William O. West and Daniel T. Brummitt, submit this reply brief in support of their motion to dismiss filed herein.

SUMMARY OF THE ARGUMENT

These defendants' motion to dismiss limited their argument to the four corners of the plaintiff's petition and the attachment thereto. Plaintiffs respond with fourteen (14) pages of allegations far beyond the scope of their petition and the Written Demand of January 12, 1999, which plaintiffs originally filed with the City of Oklahoma City. For the reasons more fully set out below, it will be shown that the defendants motion to dismiss must be granted.

ARGUMENTS AND AUTHORITIES

PROPOSITION 1

A MOTION TO DISMISS WHICH REFERS TO NO EVIDENTIARY MATERIAL OUTSIDE THE PLEADINGS IS NOT A MOTION FOR SUMMARY JUDGMENT

These defendants' motion to dismiss did not refer to any evidentiary material outside the scope of the plaintiffs' Petition and the documents attached thereto. Therefore, no reference to "facts" outside the scope of the pleadings should be allowed or considered by this Court in passing on the defendants' motion to dismiss. Even if the motion to dismiss of these defendants or that other defendants is treated as a motion for summary judgment, Rule 13 of the Rules of the District Court only required the Court to deny a motion if there is a "substantial controversy as to any MATERIAL fact."

Appendix 26

Summary judgment should be granted where there is no substantial controversy as to any material fact and one of the parties is entitled to judgment as a matter of law. Dist. Ct. Rule 13, 12 Okla. Stat. Ch.2, App. 1. A fact is material if proof of it would establish or refute an essential element of a claim or defense. *Cinco Enterprises, Inc. v. Benson*, 1994 OK 135, 890 P.2d 866. In *Hadnot v. Shaw*, 1992 OK 21, 890 P.2d 866, the Oklahoma Supreme Court defined a "material" fact for summary judgment purposes as stated above, and as follows:

> "In determining what constitutes a genuine issue as to any material fact for purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. *Austin v. Wilder*, 26 N.C.App. 229, 215 S.E.2d 794, 796 [1975]. See Fed.R.Civ.P. 56(c). A fact is 'material' and precludes ... summary judgment if proof of that fact would have effect of establishing or refuting one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle of law to the rights and obligations of the parties. *Johnson v. Soulis*, Wyo., 542 P.2d 867, 872 [1975]." Black's Law Dictionary, 5th Ed. at 881. See also *Olson v. A.H. Robins Co., Inc.*, 696 P.2d 1294, 1300 (Wyo.1985).

Id at 985, footnote 25.

A motion to dismiss is a proper approach to a case which is clearly barred by the doctrines of issue and claim preclusion. Even if the Court refers to evidentiary material to establish the preclusive judgment, that does not render the early granting of a motion to dismiss inappropriate. *National Diversified Business Services, Inc. v. Corporate Financial Opportunities, Inc.*, 1997 OK 36, 946 P.2d 662; *Ouellette v. State Farm Mutual Automobile Insurance Company*, 1994 OK 79, 918 P.2d 1363. The plaintiffs' "Statement of Facts," are all immaterial to the issues raised in these defendants' motion to dismiss. No amount of discovery will change the words on the pages of the opinions of the *Oklahoma Supreme Court in Oklahoma City v. Oklahoma City Urban Renewal Authority*, 199 OK 71, 988 P.2d 91 (*Tal I*) and *State of Oklahoma, ex rel. Moshe Tal v. Norick*, 199 OK 85, 991 P.2d 999 (*Tal II*). Therefore, these defendants motion to dismiss which is based, in part, on issue and claim preclusion should be granted and the plaintiffs' "Statement of Facts" disregarded.

PROPOSITION 2

THE PLAINTIFFS HAVE ADMITTED THEY CANNOT REMOVE THE CITY OFFICERS FROM THEIR ELECTED OR APPOINTED POSTS

As fully discussed in defendants' motion to dismiss, the District Court has no jurisdiction over actions by citizens for ouster of government officials. The defendants directed this Court's attention to the cases of *Alberty v. Parks*, 1927 OK 472, 261 P. 940 and *L-Acquarius v. Hampton*, 1982 OK 34, 642 P.2d 1143 which stand for the proposition that the District Court is without jurisdiction to entertain an ouster action on a petition filed in the District Court by private citizens. Plaintiffs' attempt to apparently retreat from their

own allegations by suggesting in Proposition 6 of their brief that they have not sought the removal of the officers from their appointed and elected positions through a direct action, but suggest that they have "asked the Court to exercise its power to instruct the City to have the appropriate authorities initiate proceedings to investigate certain officials conflicts of interest, conduct and if necessary remove them from office." This is a classic example of attempting to do indirectly that which the Oklahoma Supreme Court has held they cannot do directly. The Court cannot exercise discretionary authority to issue a writ of mandamus to the City of Oklahoma City to do something over which the Court lacks the subject matter jurisdiction. Both *Alberty* and *L-Acquarius* clearly hold that this Court lacks subject matter jurisdiction to remove elected or appointed city officials from their governmental posts. The statutory scheme for such actions, as more fully discussed in these defendants' motion for dismiss, is the exclusive remedy by which municipal officers may be removed from office for causes specified in the statutes. 11 Okla. Stat. § 8-107.

The plaintiffs' prayer for removal of officers from their governmental elected or appointed offices and for this Court to do indirectly through a writ of mandamus that which it is prohibited from doing directly must be dismissed.

PROPOSITION 3

PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs make no serious effort to deny that their claims are barred by the applicable statute of limitations. Instead they attempt to misrepresent to this Court the holding of the Oklahoma Supreme Court in *Tal II*. They suggest that their

claims are not time barred because their cause of action did not accrue until the Oklahoma Supreme Court's final decision in *Tal I*. That is not the holding of the Oklahoma Supreme Court in *Tal II*. In *Tal II* the Oklahoma Supreme Court held that plaintiffs' claims regarding the second declaratory judgment action, which remains pending in this Court today, are premature for the reasons that the City was representing the rights of all of its taxpayers in pursuing the declaratory judgment action. *Tal II* does not say anything regarding the disposition of the issues raised in *Tal I* or, and perhaps more importantly, disposition of the issues not raised in the declaratory judgment action but of which the plaintiffs attempted to complain in their Demand. This is more fully discussed in Proposition 2 of these defendants' original brief. Plaintiffs' claims, to the extent that they are based on issues allegedly omitted from the City's declaratory judgment suits are time barred. Plaintiffs have not opposed this aspect of defendants' motion and therefore it is deemed confessed. Plaintiffs did not file this action within six (6) months of the City's "refusal, failure or neglect", to act on those issues not addressed in the declaratory judgment action. The plaintiffs' Demand was filed on January 12, 1999. The plaintiffs did not bring their current action on the allegedly omitted issues until March 15, 2000. Therefore, the plaintiffs' claims are beyond the 6 month period of time prescribed by 62 Okla. Stat. § 374 therefore time barred.

PROPOSITION 4

ISSUE PRECLUSION BARS NOT ONLY THE PARTIES BUT ALSO THEIR PRIVIES

Plaintiffs suggest that they are not barred by the doctrines of issue and claim preclusion for the reason that they

were not allowed to intervene in the City's declaratory judgment action. This argument assumes, however, that the plaintiffs had some independent right that was not derived from the City. Clearly they do not. The very nature of a *Qui tam* action is derivative in nature. The plaintiffs have no independent right. In *Wilson-Harris v. Southwest Telephone Co.*, 1943 OK 303, 141 P.2d 986, 193 Okla. 194, the Court stated "We have defined the term 'privity' as a "mutual or successive relationships to the same rights or property." *Arnold v. Joines*, 50 Okl. 4, 150 P. 130, 133." 141 P.2d at 990. Privity involves a person so identified in interest with another that he represents the same legal right. *Hildebrand v. Gray*, 1993 OK CIV APP 182, 866 P.2d 447. Here there is only one "legal right" involved. Plaintiffs have no private right. Their only claim is derivative. Therefore, plaintiffs are, by definition, privies of the City and thereby bound by the rulings in *Tal I* and *Tal II*.

As the Oklahoma Supreme Court stated in *Tal I*:

> The case has been tried and directive develop supports the trial courts finding that the property at issue was sold at fair market value and the protections for the public to safeguard this interest spelled out in the Agreements were adequate. **THIS ENDS THE INQUIRY.** In TAR's expression of a contrary opinion in its Demand without actual support does not change the result.

The Oklahoma Supreme Court held that there was nothing in the record to reflect that the City had acted in bad faith. The fact that issues were decided by the City Council in a manner that the plaintiffs do not like does not in any way

support their claim that the subject agreements were fraudulent, unlawful or otherwise invalid.

PROPOSITION 5

PLAINTIFFS' CLAIMS REGARDING DUE PROCESS ARE WITHOUT FOUNDATION

Plaintiffs attempt to boot strap themselves into a denial of due process claim. However, when this argument is examined in light of due process jurisprudence, the erroneous assumptions underpinning plaintiffs' argument become obvious.

The due process clause is broken down into two distinct concepts, substantive and procedural due process. What the plaintiffs are complaining of here is that they were denied procedural due process through Judge Gray's denial of their motion to intervene in the declaratory judgment action initiated by the City in response to plaintiffs' Written Demand. The Oklahoma Supreme Court affirmed the denial of plaintiffs' motion to intervene. If the plaintiffs believed that they were denied procedural due process, that issue should have been raised in their appeal from Judge Gray's denial of their motion to intervene. It was not, and the plaintiffs cannot now collaterally attack that order.

A procedural due process analysis requires two separate inquiries. First, did the plaintiffs lose something that fits into the three protected categories of life, liberty or property. If so, the court then moves to the second part of the inquiry; did the plaintiffs' receive the minimum measure of procedural protection warranted under the circumstances. *Farthing v. City of Shawnee, Kansas*, 39 F.3d 1131 (10th Cir. 1994).

In this case the analysis ends with the first half of the inquiry. The plaintiffs were not deprived of life, liberty or property. They had no protected property right in issue in this case. They certainly had no right to procedural due process for anything that they did not raise in their Demand. As a result, since the plaintiffs lack any protected right of life, liberty or property, they were not entitled to any form of procedural due process. The Oklahoma Supreme Court has recognized that one who has no interest may not insist on receiving notice or an opportunity for hearing. *Turley v. Flag-Redfern Oil Company*, 1989 OK 144, 782 P.2d 130. To have a constitutionally protected interest sufficient to be entitled to due process, the party must have more than an abstract need and must have a legitimate claim of entitlement that is defined by an existing rule or understanding that stems from some independent source such as state law. *Davila-hopes v. Zapata*, 111 F.3d 192 (1st Cir. 1997). The person must have more than an abstract need, he must have a legitimate entitlement to it. *Greenholtz v. Inmates of Nebraska Penal and Correction Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).

If the Court were to determine that the plaintiffs did have some protected right, the second half of the inquiry, *i.e.* did the plaintiffs received the minimum measure of procedural protection warranted under the circumstances, is even easier. The consideration of what procedural due process may be required under any given set of circumstances begins with a determination of the precise nature of the governmental function involved as well as the private interest that has been affected by government action. In *McLin v. Trimble*, 1990 OK 74, 795 P.2d 1035, the Oklahoma Supreme Court observed that "[t]he Due Process Clause does not, by itself, mandate any particular form of procedure . . . Due Process

is not a technical concept with a fixed content unrelated to time, place and circumstances, 'Due Process is flexible and calls for such procedural protections as the particular situation demands.'" *Id* at 1040.

The Oklahoma Supreme Court has also held that the due process clause does not require a hearing in every conceivable case of government impairment of a private interest. *Medina v. State*, 1993 OK 121, 871 P.2d 1379.

Here the plaintiffs had no private interest that was affected by the government action. Furthermore, the governmental function is one that exclusively belongs to the legislative branch of government. As discussed in more detail in defendants' brief, it is not the proper function of the *Qui tam* action to second guess the business decision of the City's elected officials. As the Oklahoma Supreme Court has held in *Utility Supply Company, Inc. v. City of Broken Arrow*, 1975 OK 106, 539 P.2d 740:

> It is not the function of courts to substitute their judgment for that of duly constituted municipal legislative authorities . . . .
>
> The court may not test in the balances of judicial review the weight and sufficiency of facts which sustained the conclusion of the legislative body. *Id.* at 743.

The plaintiffs were afforded an opportunity to be heard. Their Written Demand and their individual depositions were made a part of the record considered by Judge Gray. As the opinion of the Oklahoma Supreme Court clearly demonstrates,

the trial court gave them their opportunity to be heard on that motion. As the Oklahoma Supreme Court observed:

> On February 22 and 23, 1999, Defendants took the deposition of Appellants . . . . Appellants' attorney appeared at each of the depositions. Tal's deposition was 129 pages long. After the trial had commenced, Appellants' attorney filed a motion to intervene and for continuance. The trial court, after argument of counsel, considering the depositions of Tal and the other T.A.R. members who had been deposed, and also considering T.A.R.'s Written Demand, denied T.A.R.'s motion to intervene.
>
> * * *
>
> Tal's claims that the failure of the trial court to allow him to intervene and hear his testimony was prejudicial to his rights and those of T.A.R. We note, however, that the trial court considered Tal's 129 page deposition and Tal does not suggest that there are any facts in support of his claim of unlawfulness beyond those contained in the allegations of T.A.R.'s Demand. The trial court read and considered T.A.R.'s Written Demand and the depositions of all of its members. It is obvious that the trial court concluded that the factual allegations in T.A.R.'s Demand and the deposition testimony of its members were insufficient to support T.A.R.'s claim for intervention. For the reasons previously discussed, we agree.

* * *

> The trial court heard T.A.R.'s arguments and read the depositions of its members before ruling on T.A.R.'s motion to intervene.

* * *

> T.A.R. was not entitled to intervene in Oklahoma City's declaratory judgment action because Oklahoma City was representing the rights of all of its taxpayers and was entitled to the presumption that it would do in good faith. T.A.R. failed to overcome this presumption. Further T.A.R. made no claim and the record would not support that Oklahoma City's suit was conclusive or frivolous. Thus, the trial court did not error in denying both T.A.R.'s motion to intervene and its motion for continuance.

It is clear from the foregoing that the Oklahoma Supreme Court observed not just once or twice, but at least four times in its opinion that the trial court had carefully considered TAR's motion to intervene, the Written Demand of January 12, 1999, filed with the City, and the deposition testimony of its members. Plaintiffs now suggest in their response to defendants' motion that the "usual stipulation" made at the beginning of the plaintiffs depositions led the plaintiffs to believe that they would be notified of the trial and would have an opportunity to, mandated by due process, submit their objections and/or rebut any issues. That is an issue, if that is in fact what plaintiffs were led to believe, which the plaintiffs should take up with the lawyer who represented them at that deposition. The fact that their

lawyer, whom the Oklahoma Supreme Court observed, was present at the deposition, chose not to expand the record and submit the information which they now contend entitles them to further inquiry of the issues decided in *Tal I*, should fall on deaf ears.

The plaintiffs, in their brief, try to give justifications for reasons that their proposed petition in intervention in *Tal I* was limited in scope. Such strategic decisions by the plaintiffs' prior counsel, does not constitute a deprivation of procedural due process. The fact that they chose not to tell what they now contend is their whole story, does not mean that they were not given the opportunity to do so. All the due process requires is the opportunity to be heard. The plaintiffs cannot now be heard to turn their decision to hide behind the log into a denial of due process and an opportunity to be heard. Clearly, plaintiffs had their opportunity, they argued their motion to intervene, the trial court clearly considered their deposition testimony and their Written Demand, the fact that they chose not to present all of that which they now contend is the whole story is immaterial to the due process inquiry.

PROPOSITION 6

THE PLAINTIFFS' CLAIMS AGAINST INDIVIDUAL DEFENDANTS WHO WERE NOT MENTIONED AND WHICH CLAIMS WERE NOT INCLUDED IN THEIR DEMAND ARE NOT A PROPER SUBJECT IN THIS *QUI TAM* ACTION

Plaintiffs lack the standing to receive monetary damaged against current and past City officials. Plaintiffs' Written Demand of January 12, 1999, makes no request for such

relief. Therefore, plaintiffs cannot now seek monetary relief against the individuals. Plaintiffs reliance on *State of Oklahoma, ex rel. G.E. Hettel v. Security National Bank and Trust Company in Duncan*, 1996 OK 53, 922 P.2d 600, is misplaced. *Hettel* stands for the proposition that *Qui Tam* statutes are penal statutes in nature as they relate to imposing personal liability on various persons. Therefore, those statutes are to be strictly construed. The statutes provide for possible personal liability of any person who shall direct payment of a fraudulent claim, which is not applicable here, or direct payment of money or transfer of property of the City pursuant to a "unauthorized, unlawful or fraudulent contract or agreement." To be entitled to proceed to prosecute the claims against the individuals, the plaintiffs would be required to show that the contracts at issue were "unauthorized, unlawful or fraudulent." Here, *Tal I* has established that the contracts and agreements in question are in fact lawful, authorized and free from any claims of fraud. Therefore, the prerequisite to any claim of personal liability is missing and the claims against the individuals must therefore be dismissed.

PROPOSITION 7

ARGUMENTS RAISED IN DEFENDANTS' MOTION, AND NOT OPPOSED OR EVEN ADDRESSED IN PLAINTIFFS' RESPONSE ARE DEEMED CONFESSED

In the motion to dismiss filed by these defendants they specifically raise the fact that the City's decision to build a new power plant to provide heating and air conditioning to the refurbished Myriad and the new sports arena were purely a business decision made by the elected City government and that such decision was exclusively within the City's legislative

authority. The plaintiffs have not opposed this aspect of these defendants' motion, and further have not so much as addressed issues relating to the power plant raised in these defendants' motion to dismiss. As a result, that aspect of these defendants' motion to dismiss should be deemed confessed pursuant to Rule 4.e of the Rules of the District Courts.

CONCLUSION

Plaintiffs' response brief and its fourteen (14) page recitation of factual allegations which are outside the scope of the pleadings must fall on deaf ears. The issues which the plaintiffs seek to re-litigate in this case have been fully decided. The plaintiffs efforts to second guess and substitute their business judgment for that of the elected City officials must also be rejected. It is not the function of the judiciary to reevaluate the business decisions made by the legislative branches of government. Our republic is founded on the concept of representative government and the separation of powers.

For these reasons, and the reasons more fully set out above and in the defendants' motion to dismiss, these defendants pray this Court to dismiss this action with prejudice to future filing and without leave to amend the pleadings, for such amendment will not cure the defects pointed out herein.

Dated this 24th day of April, 2000.

/S/ Kieran D. Maye, Jr.
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THOMPSON, WILLIAM O. WEST
and DANIEL T. BRUMMITT

[Certificate of Service Omitted in Printing]

Appendix 40

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, resident taxpayer of The City of Oklahoma City, Oklahoma & Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Plaintiffs/Appellants,

vs.

Supreme Court
Case No. 94,874

The City of Oklahoma City ("City"), Oklahoma, a municipal corporation; Ronald J. Norick, in his personal and official capacity as former Mayor of the City; Kirk D. Humphreys, in his personal and official capacity as the Mayor of the City; James E. Thompson, in his personal and official capacity as Assistant City Manager & former MAPS Director; William O. West, in his personal and official capacity as City's Municipal Counsel; Daniel T. Brummitt in his personal and official capacity as City's Assistant Municipal Counselor; The Oklahoma City Urban Renewal Authority ("Urban Renewal"), a public body corporate; Tiana P. Douglas, in her personal and official capacity as the Executive Director of Urban Renewal; Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warren Gardner, and James R. Tolbert III, in their personal and official capacities as Commissioners of the Urban Renewal; William ("Bill") O. Johnstone in his personal and official capacity as the former Commissioner of Urban Renewal; Dan Batchelor, in his personal and official capacity as legal counselor of Urban Renewal; Bricktown Parking Investors, L.L.C., an Oklahoma Limited Liability Company;

Bricktown-TMK/Hogan Parking, L.L.C., an Oklahoma Limited Liability Company; OKC Athletic Club Limited Partnership, an Oklahoma Limited Partnership; BAP-Bricktown, L.L.C., an Oklahoma Limited Liability Company; TMK/Hogan, a Joint Venture; Bricktown TMK/Hogan Entertainment, L.L.C., an Oklahoma Limited Liability Company; Hogan Property Management, L.L.C., an Oklahoma Limited Liability Company; Torchmark Corporation ("TMK"), an Alabama Corporation; Torchmark Development Corporation ("TDC") and TMK Income Properties, L.P. ("TIP") both subsidiaries of TMK; Dan Randolph ("Randy") Hogan; Edwards Theatres Circuit, Inc., a California corporation; Oklahoma Gas & Electric Company, ("OG&E"), an Oklahoma corporation; The Benham Group, an Oklahoma Corporation; and John Doe No. 1-50,

Defendants/Appellees.

PETITION FOR REHEARING

The Plaintiffs/Appellants, Moshe Tal and T.A.R. ("Taxpayers"), respectfully move the Court to modify or amend the language contained in its Decision *State of Oklahoma, ex. rel. Moshe Tal v. The City of Oklahoma City, et. al.*, 2000 OK 70, rendered on September 26, 2000 in this appeal. The Taxpayers are not asking this Court to reconsider its decision affirming the trial court's dismissal of this action. However, they are asking this Honorable Court to reconsider and modify the language used in its opinion to the extent that it either reflects matters outside the appellate record, renders an advisory opinion, used language imposing a chilling effect on the Taxpayers' constitutional right and/or contains inaccurate statements as to the contents of the record.

Appendix 42

PART I

DELETION OF ADVISORY OPINIONS

Courts will not issue advisory opinions. *Post Oak Oil Co. v. Stack & Barnes, P.C.*, 1996 OK 913 P.2d 1311, 1314; *Graham v. Hudgins, Thompson, Ball & Assoc., Inc.*, 1975 OK 540 P.2d 1161; *Rogers v. Excise Bd. of Greer County*, 1984 OK 701 P.2d 754; *PPG Industries, Inc.*, 11 CIT at 303, 660 F. Supp. at 968 (quoting *Flast v. Cohen*, 392 U.S. 83, 96, 88, S.Ct. 1942, 20 L.Ed.2d 947 (1968)). For a court to have jurisdiction to consider a case, "a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interest. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *North Carolina v. Rice*, 404 U.S. 244, 246, 92, S.Ct. 402, 30 L.Ed.2d 413 (1971) (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41, 57 S.Ct. 461, 81 L.Ed. 617 (1937)). The fact that an issue presented for review may need to be addressed in the future does not by itself create a live case or controversy. *Nat'l Labor Relations Board v. Globe Security Services, Inc.* 548 F.2d 1115, 1118 (3rd Cir. 1977).

The Court's opinion in this matter contains two advisory opinions. The most significant and far reaching advisory opinion relates to the Taxpayers' Constitutional Rights and is contained in Justice Watt's Opinion Concurring in Part and Dissenting in Part. The other advisory opinion is found in the per curium decision and is expanded upon in Justice Watt's opinion.

A. Advisory Opinion Denying Constitutional Right of Access to the Courts.

The first advisory opinion is contained in Justice Watt's concurring/dissenting opinion. In that opinion Justice Watts states: "I would expect, therefore, that Tal and T.A.R. would engage in no more conduct designed to lengthen this litigation or any other arising from the Bricktown development."

Justice Watt's statement is an advisory opinion. Justice Watts's statement prejudges, as improper, any other actions that Tal or the Taxpayers might hypothetically take in this Court, the district court or any other court which might have jurisdiction over such conflicts. It is an opinion advising what action the court might take based upon a hypothetical set of facts.

i. Chilling Effect of Language on Taxpayers' Constitutional Right of Access to the Courts.

Justice Watt's advisory opinion also has an improper chilling effect on the Taxpayers' constitutional right of access to the courts. Each person is guaranteed a right of access to the courts by virtue of the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 2, §§ 6 & 7 of the Oklahoma Constitution. *Haggard v. Studie*, 1980 OK CIV APP 610 P.2d 1228,, 1231; *Silver v. Cormier* 529 F.2d 161, 163 (10th Cir. 1976) (citations omitted). This right of access to the courts cannot be infringed upon or burdened. *Haggard v. Studie*, 1980 OK CIV APP 610 P.2d at 1231; *Silver v. Cormier*, 529 F.2d at 163 (citations omitted). In *Silver v. Cormier* the Tenth Circuit held that "[a] public official's threats to a citizen to withhold monies due and owing, should

legal proceedings on an independent matter be instituted, burdens or chills constitutional rights of access to the courts." *Id.* at 163.

Like the threat made in *Silver*, Justice Watts threat of sanctions against the Taxpayers and/or Tal if they "engage in any other conduct designed to lengthen this or any other litigation relating to Bricktown development" violates the Taxpayers' and Tal's constitutional right to access to the courts. Surely, it is improper to include such language in an Opinion of this Court. Thus, Taxpayers respectfully request that Justice Watt amend the language of his opinion to avoid the violation of citizens' constitutional rights.

Moreover, Justice Watt's language creates a quandary for the Taxpayers, Mr. Tal and other litigants in this case as well as other pending appeals and litigation. Justice Watt's statement implies that he views any other filings in this case or others that touch upon the Bricktown Development as sanctionable. As that applies to this litigation, does this mean that Taxpayers were not permitted to file this Motion for Reconsideration? Are the Taxpayers prohibited from contesting the amount of attorneys' fees to be awarded in this matter at the hearing set on December 1, 2000? Are the Taxpayers prohibited from appealing the award of Attorneys' Fees in the trial court?

What about the Hogan Groups' appeal of the denial of sanctions currently pending before this Court? *The State of Oklahoma ex. rel. Moshe Tal v. The City of Oklahoma City, et. al.*, Supreme Court Appeal No. 95271. Justice Watt's admonition that the Taxpayers not engage in any conduct that will cause delay seems to instruct the Taxpayers that they should not file a response to the Petition in Error or an

Answer Brief in the appeal, since the filing of these documents will "delay" the resolution of the appeal.

Also, currently pending before this Court is the appeal of the Condemnation of Tal Technologies Property in Bricktown. *The City of Oklahoma City v. Tal Technologies, Inc.*, Supreme Court Case Number 94,045. The issue in that appeal is the necessity of the taking. The amount of compensation is still awaiting trial in the district court. Are Tal and his corporation prohibited from filing pleadings in that appeal or going forth with the trial on the amount of compensation? Surely such filings and a trial will constitute conduct "lengthening litigation arising from the Bricktown Development."

Lastly, there is a tortious interference with contract suit pending in the District Court brought by Mr. Tal and his partners against Dan Randolph Hogan, TMK/Hogan Joint Venture, Hogan Propert Management, L.L.C. and Bricktown TMK/Hogan Entertainment, L.L.C. *Tal et. al. v. Hogan, et. al.*, Oklahoma County District Court Case Number CJ-2000-5333. In this action Mr. Tal and his partners are seeking to litigate their personal rights to recover for tortious interference against other private citizens. Justice Watt's statement seems to suggest that Mr. Tal and the other plaintiffs in that action are prohibited from pursuing that action to seek redress for harm caused by the defendants.

Justice Watt's advisory opinion unquestionably chills the Taxpayers', Mr. Tals' and other related litigants' constitutional right of access to the courts. The Taxpayers therefore respectfully request that the language of Justice Watt's opinion be modified to remove the improper advisory opinion.

B. Advisory Opinion on the Motion to Strike.

The second advisory opinion is found in the per curium opinion and Justice Watt's concurring/dissenting opinion. This advisory opinion finds that the Taxpayers' Motion to Strike OG&E's Supplement to the Record. The Taxpayers showed the Court that OG&E's Motion was not a proper part of the record on appeal because it had never been ruled upon or considered by the trial court in rendering the judgment. OG&E's Motion was not even filed until after the trial court had dismissed the action pursuant to the City's, the Hogan Group's and Urban Renewal's Motion's to Dismiss. Furthermore, OG&E's Motion was mooted when the Taxpayers' voluntarily dismissed OG&E and the other remaining defendants because the Taxpayers believed that no viable action against those defendants remained after the dismissal of the City. Similarly mooted was the pending Motion to Dismiss filed by BAP Parking L.L.C. and the Motion for Summary Judgment filed by Torchmark Corporation. *See Trial Court Docket 4/10/00 and 5/02/00.* Unlike OG&E, neither BAP or Torchmark attempted to supplement the appellate record with their motions.

The Taxpayers filed their Motion to Strike on August 28, 2000. OG&E's Response was due on September 15, 2000. However, OG&E still had not filed an Answer to the Motion to Strike by the time this Court filed its decision in this matter on September 26, 2000. Apparently OG&E had no objection to having their Supplement stricken from the Record on Appeal.

Despite the lack of opposition to the Motion to Strike, this Court not only denied the Motion, but went so far as to ascribe some imporper motive to the Taxpayers' reason for

filing the Motion to Strike. The Court and Justice Watt, opine, hypothetically, that the Taxpayers were seeking to strike OG&E's supplement so that the Taxpayers could file another appeal in this matter. There are no facts whatsoever for such a conclusion by this Court.

The Court's and Justice Watt's discussions of the reasons for denying the Taxpayers' Motion to Strike, violate the proscription against rendering advisory opinions.[1] The Opinions are based upon the Court's and Justice Watt's hypothetical belief that the Taxpayers filed the Motion to Strike in an attempt to engineer another appeal in this matter. Using this hypothetical motive as a basis, the Court and Justice Watt, hypothesize and render an advisory opinion, that if such an appeal were filed, it would be improper. However, no such appeal has been filed, no party has suggested that such an appeal might be possible, and the Taxpayers cannot even imagine what sort of appeal might be brought.

Without question, this Court's findings that such an appeal would be improper, when no such appeal has been filed, is "an opinion advising what the law would be upon a hypothetical state of facts." "The fact that an issue presented for review may need to be addressed in the future does not by itself create a live case or controversy." *Nat'l Labor Relations Board v. Globe Security Services, Inc.*, 548 F.2d

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[1] The denial of the Motion to Strike also violates and overrules this Court's own precedent and rules regarding the contents of the Record and matters that will be considered on appeal. *See Dyke v. St. Francis Hospital, Inc.*, 1993 OK 114 ¶ 11, 861 P.2d 295, 299-300 ("a party cannot supplement the record on appeal by injecting into it material *that was not before the trial court* at the decisional stage of the case").

1115, 1118 (3rd Cir. 1977). While this Court may deny the Motion to Strike, it is improper for it to render an advisory opinion on any hypothetical appeal this Court believes the Taxpayers might attempt to bring.

PART II

MODIFICATION OF INACCURATE STATEMENT REGARDING CONTENTS OF RECORD.

In its Opinion, this Court has stated that "[n]owhere in their brief did Tal and T.A.R. attempt to explain why they had standing to prosecute a *Qui Tam* action under their Written Demand, although we had held in *Tal I* that they lacked standing to do so."

While this Court may not have found Taxpayers' discussion or citation of authority on standing to be persuasive or correct, it is inaccurate to state that Tal and T.A.R. did not *attempt to explain* why they had standing to prosecute a *Qui Tam* action despite the holding in *Tal I*.

In the Statement of Facts, the Taxpayers quote *Tal I* where it is stated that:

> There is but a single, narrow issue in this case: Did the trial court err in denying T.A.R.'s motions to intervene and for continuance? *City of Oklahoma City v. Oklahoma City Urban Renewal Authority*, 1999 OK 71 ¶ 14. 988 P.2d 901,905.

Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Statement of Fact No. 38, pg 13.

No where in *Tal I* did this Court hold that the Taxpayers would not have standing to bring a Qui Tam in a separate action after the conclusion of the Declaratory Judgment. To so hold would have constituted an advisory opinion since the issue was not before the Court. The narrow scope of the *Tal I* decision coupled with relevant authority, lead the Taxpayer's to explain, in Statement of Fact No. 39, their belief that this Court's "holding that the Taxpayers did not have a right to intervene is not co-extensive with a finding that T.A.R. is precluded from bringing a Qui Tam following the resolution of the Declaratory Judgment." *Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Statement of Fact No. 39, pg 13.*

Although not cited in their Brief, Taxpayers were lead to this belief by, *inter alia*, the language in the Legislative Commentary to Federal Rule of Civil Procedure 24, following the 1966 amendments, wherein it is explained that even though a class member is denied intervention on the grounds that representation is adequate, the class member may be permitted to show in a subsequent action that the representative party did not, in fact, adequately represent the class member and, therefore, the class member is not bound. FRCP 24 (a)(2) Intervention, Commentary to 1966 Amendments, *citing Hansberry v. Lee*, 311 U.S. 32 (1940) (Taxpayers similarly cited *Hansberry v. Lee* for the proposition that it is a violation of due process to preclude a plaintiff from bringing an action based upon a decision in a previous action brought by a representative party who did not adequately represent the plaintiff's interests). *See Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss*, pg 15.

The Taxpayers believed, and attempted to state, that they had a right to establish standing based upon a showing of

the inadequacy of representation. Thus, they concentrated their efforts to show standing from this perspective in the Statement of Facts, the attached evidence and in Proposition IV of the their Brief.

The Taxpayers will not ask this Court to reconsider their decision that Taxpayers had no standing to bring this action. However, they respectfully ask the Court to amend the language in the opinion stating that "*[n]owhere* in their brief did Tal and T.A.R. *attempt* to *explain* why they had standing to prosecute a *Qui Tam* action under their Written Demand, although we had held in *Tal I* that they lacked standing to do so." (Emphasis added) While the Taxpayers' "attempt" to explain their position on standing was obviously not clear to this Court, and was ultimately unsuccessful, the attempt was made.

PART III

DELETION OF REFERENCES TO MATTERS OUTSIDE THE APPELLATE RECORD.

On consideration of an appeal, the appellate court is strictly limited to the record before it. *Fent v. Oklahoma Natural Gas Co., a Div. of Oneok Inc.*, 1994 OK 108, fn 13 898 P.2d 126, 136. Unlike the trial courts, an appellate court may not take judicial notice of any material on file below, which is not incorporated into the record for review. *Fent v. Oklahoma Natural Gas Co., a Div. of Oneok, Inc.*, 1994 OK 108, fn 10, 898 P.2d at 136.

In his separate opinion, Justice Watt has taken notice of and commented upon matters not within the appellate record. "In this connection, I note that the trial court has

granted appellees' motions for sanctions and attorneys' fees incurred as a result of Tal and T.A.R.'s conduct in having filed the suit in the first place." *T.A.R. v. Oklahoma City et. al.*, 2000 OK 70 ¶ 2 (Watt, J. opinion concurring in part and dissenting in part).[2] "On this score I observe that motions for sanctions for Tal and T.A.R.'s conduct in this case are presently pending and I would have granted appellants leave *sua sponte* to file additional motions for sanctions." *T.A.R. Oklahoma City et. al.*, 2000 OK 70 ¶ 2 (Watt, J. opinion concurring in part and dissenting in part).

The Defendants' Motions for Attorneys' Fees were not part of the record on appeal. Nowhere in the record are the Motions for Attorneys' Fees or the granting of such Motions, mentioned or referenced in any manner.

Because the Motions for Attorneys' Fees are matters outside of the Record and are not cognizable on appeal, the Taxpayers respectfully request that the language referring to those Motions and their disposition in the lower court, be removed from the Opinion.

CONCLUSION

To the extent the Court's and Justice Watt's Opinions reflects matters outside the appellate record, renders an advisory opinion, uses language imposing a chilling effect on

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[2] This statement is partially inaccurate in that the Motions for Sanctions filed by the Defendants were denied at a hearing on June 23, 2000. It is accurate that the Motions for Attorneys' Fees were granted in favor of the City, Urban Renewal and the Hogan Group. However, a Motion for Reconsideration of the Award of Attorneys' Fees is currently pending in the District Court.

the Taxpayers' and others' constitutional rights and/or contains inaccurate statements as to the contents of the record Taxpayers respectfully ask this Honorable Court and the Honorable Justice Watt, to remove or modify those portions of the Opinions.

Respectfully submitted,

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